

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

75-7049, 75-7158

United States Court of Appeals
FOR THE SECOND CIRCUIT

ANITA B. BRODY,

Plaintiff-Appellant,

—against—

CHEMICAL BANK, MANUFACTURERS HANOVER TRUST COM-
PANY, IRVING TRUST COMPANY, CHASE MANHATTAN BANK,
N.A., BANK OF MONTREAL, GIRARD TRUST BANK and
THE FIDELITY BANK,

Defendants-Appellees,

—and—

PENNSYLVANIA COMPANY,

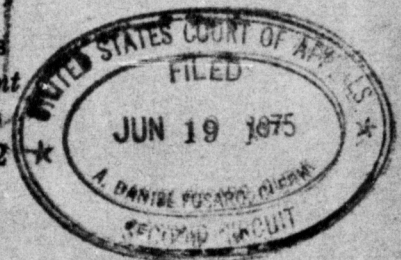
Defendant.

PETITION FOR REHEARING

WOLF POPPER ROSS WOLF & JONES
Attorneys for Plaintiff-Appellant
845 Third Avenue
New York, New York 10022

BENEDICT WOLF
LESTER L. LEVY

Of Counsel



PETITION FOR REHEARING
BY PLAINTIFF-APPELLANT

Plaintiff-appellant, pursuant to Fed. R. App. P., Rule 40, petitions for rehearing of the decision of this Court dated June 9, 1975, and requests that, insofar as it affirmed the judgment of the District Court dismissing this action with prejudice, it be vacated and the judgment of the District Court be reversed, or that, consistent with the aforesaid decision of this Court, it be modified to direct that plaintiff be given an opportunity to request the present Board of Directors of defendant Pennsylvania Company (Pennco) to take over this action.

REASON FOR GRANTING THE PETITION

We respectfully submit that the Court, in affirming the District Court's judgment of dismissal of this action with prejudice for plaintiff's failure to comply with Fed. R. Civ. P. 23.1 in that she failed to make demand on the "new directors" of Pennco in accordance with the previous decision of this Court, apparently based its affirmance on a factual error, apparently overlooking the fact that when the previous decision of this Court made reference to demand only on the "new board of four directors for Pennco" (482 F.2d 1111, 1114) this "new board of four directors" was the board which was in office at the time of the institution of this action, and was the board with regard to which plaintiff in her Second

Amended Complaint pleaded futility of demand. Consequently the District Court, in interpreting the prior opinion of this Court to require demand on a later board of directors, with different personnel, a board which was not the "new board of four directors" referred to in this Court's prior opinion as having been selected by the four trustees of the bankrupt Railroad, gave this Court's prior opinion an incorrect reading and placed a requirement upon plaintiff which was inconsistent with the direction contained in this Court's prior opinion.

THE FACTUAL SITUATION

At the time the defendants moved to dismiss the First Amended Complaint on November 21, 1971, the board of directors of Pennco consisted of four persons selected by the trustees of Railroad. While the defendants thereafter presented an affidavit from an officer of Pennco verified July 13, 1972 (improperly, since on the motion to dismiss pursuant to Rule 12(b)(6) only the facts alleged in the complaint should have been considered) in which affidavit a statement was made that in March, 1972, four additional persons had become directors of Pennco, thus creating an eight man board, Judge Gagliardi disregarded this affidavit, and referred in his decision only to the four man board in office at the time the defendant's motion was made, on November 21, 1971.

There can be no question about this, since Judge Gagliardi, in his decision of July 26, 1972, the decision which was before this Court when it rendered its opinion of July 3, 1973, specifically named the four members of the board to which he was referring. He said:

"In the period between the appointment of the trustees and the filing of the complaint in this action, a new Pennco Board of Directors took office.³" (underlining added)

Footnote 3 was as follows:

"³ Alfred W. Martinelli, Senior Vice President and Administrative Officer, Pennsylvania Company - director as of November 19, 1970;

John H. McArthur, Associate Dean and Professor, Harvard Graduate School of Business Administration - director as of September 23, 1970;

Victor H. Palmieri, President and Chief Executive Officer, Pennsylvania Company and Great Southwest Corporation - director as of October 22, 1970;

George K. Whitney, Retired Managing Trustee, Massachusetts Investment Trust, Consultant to Massachusetts Financial Services, Inc., Honorary Chairman of the Board, Transportation Association of America - director as of October 22, 1970."

This Court in its opinion of July 3, 1973, discussing Judge Gagliardi's earlier decision, stated:

"Inasmuch as four trustees have been appointed for the bankrupt Railroad, and since they in turn have selected a new board of four directors for Pennco, we cannot disagree with the court below that the allegations of the complaint are insufficient to excuse plaintiff's failure to make a demand on the Pennco board." (underlining added)

This Court could only have been referring to the four man board listed in Judge Gagliardi's decision, the board which held office in June 1971, when this case was started.

There was no other four man board selected by the trustees. In March 1972, four additional members were added, creating an eight man board.

When this Court went on, in its decision of July 3, 1973, to state that . . . "[B]ut [i]n view of the gravity of the alleged wrongdoing we cannot agree with the final dismissal and therefore remand. The plaintiff then may either make a demand on the directors or not, as she chooses." (underlining added), plaintiff was justified in assuming that "the directors" were the "new board of four directors of Pennco" referred to in the previous paragraph of the Court's opinion, the four man board whose names were set forth in footnote 3 of Judge Gagliardi's decision, the four man board which was the board of directors of Pennco when this action was started in June 1971.

That this assumption by plaintiff was not unreasonable can be seen also from the fact that defendants made the same assumption. When they moved on February 8, 1974 to dismiss the Second Amended Complaint, they set forth their "Argument" for dismissal in their Memorandum in these words (p. 8):

"ARGUMENT

PLAINTIFF HAVING FAILED TO EXCUSE HER FAILURE TO MAKE A DEMAND UPON PENNCO'S DIRECTORS TO COMMENCE THIS DERIVATIVE ACTION, THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED." (underlining added)

Defendants directed their argument solely to their position that plaintiff failed to support her conclusion of the futility of demand on the Pennco board in office at the date of commencement of this action. They said (pp. 10 & 11):

"As both this Court and the Court of Appeals recognized (Brody v. Chemical Bank, Docket No. 71 Civ. 2639 at 6 (S.D.N.Y. July 26, 1972); 482 F.2d 1111, 1114 (2d Cir. 1973)), after the date of the alleged wrongdoing, but prior to the institution of this action by plaintiff, four court-appointed trustees took over the direction of the affairs of Railroad. An entirely new board of directors was designated: . . . " (underlining added)

naming the four men whom Judge Gagliardi had listed in footnote 3 of his earlier decision.

In no place did defendants raise the objection that plaintiff failed to make demand or show futility of making demand on the board of directors in office when the Second Amended Complaint was filed. For the convenience of the Court we are submitting herewith a copy of defendants' Memorandum.

We respectfully submit that this Court's statement in its decision of June 9, 1975 that:

"This court's previous opinion expressly noted that the composition of the Pennco Board had changed since the institution of the suit. . . ."

is factually incorrect, since as can be seen from footnote 3 of Judge Gagliardi's decision of July 26, 1972, the four men who constituted the "new board of four directors for Pennco"

were all appointed prior to June 14, 1971, the date this suit was instituted, and there had been no other board of four directors after that date.

Therefore it was not correct to conclude, as this Court did, in its June 9, 1975 decision ". . . and this plaintiff should have been alerted as to the proper board for all future Rule 23.1 purposes" if this meant that she should have been aware that this Court was referring to a board other than the four man board whose names were set forth by Judge Gagliardi.

We respectfully submit that under the circumstances set forth above plaintiff was acting reasonably when she concluded that Judge Gagliardi's Memorandum Decision of December 5, 1974 (App. p. 109*) was a misinterpretation of this Court's decision of July 3, 1973 and that it was proper for her to submit the question to this Court rather than follow Judge Gagliardi's direction to make demand on a board of directors which took office at a later date. Since her interpretation of this Court's decision was not unreasonable, it does not warrant the harsh penalty of a dismissal of the action.

If plaintiff's interpretation of this Court's prior decision was incorrect and she was therefore not entitled to have her allegations of futility of demand judged in relation to the four man board of Pennco appointed by

the trustees of Railroad and in office when this suit was instituted, under the "relation-back" principle of Fed. R. App. P. Rule 15, and thus be entitled to a reversal of the District Court's dismissal of the action with prejudice, we respectfully submit that she should have been given an opportunity, after being advised by this Court of the meaning of its prior decision, to make a demand on the present board of directors of Pennco that Pennco "take over [this] suit which was brought on its behalf in the first place, . . . "

CONCLUSION

For the foregoing reasons it is requested that this Court grant a rehearing of its decision of June 9, 1975, and that its judgment of that date be vacated and that the judgment of the District Court dismissing this action with prejudice be reversed, or that the judgment of the District Court be modified to direct that plaintiff be given an opportunity to request the present board of directors of Pennco to take over this action.

June 18, 1975

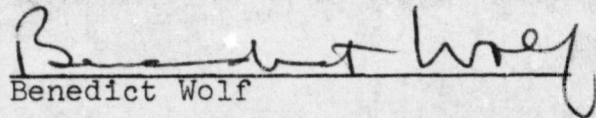
Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES
Attorneys for Appellant
845 Third Avenue
New York, New York 10022

Benedict Wolf
Lester L. Levy
Of Counsel

CERTIFICATE OF COUNSEL

BENEDICT WOLF, a member of the firm of Wolf Popper
Ross Wolf & Jones, attorneys for petitioner, hereby certifies
that the foregoing Petition for Rehearing is presented in
good faith and not for delay.


Benedict Wolf



